

The respondent developed a piece of land in the Mukim of Johor Bahru into a housing estate and built low cost houses ('the premises') and rented them out. The appellant was one of the occupiers of the premises. The terms and conditions of the appellant's tenancy were governed by a tenancy agreement dated 6 September 1977 which included an option to purchase the premises on completion of a period of tenancy of three years at a price to be determined by the respondent. The appellant exercised his option to purchase the premises in June 1980 and the respondent offered to sell the premises to the appellant for a sum of RM14,000. However, the appellant rejected the offer on the basis that it was not in compliance with an oral representation made by the representative of the respondent, one Tan Sri Dato' Hj Basir ('Tan Sri Basir') who was present at the meeting in September 1978, together with other officers of the respondent and a member of the state legislative assembly (PW2), which was held for the purpose of discussing the option where the purchase price was quoted as being between RM7,000-RM8,000. Consequently, the respondent withdrew their offer of sale. In December 1985, the respondent gave the appellant a month's notice to vacate the premises. A second notice to quit was given in July 1986. The appellant has yet to give up possession to this day. In proceedings filed against the respondent in March 1986, the appellant claimed, inter alia, for: (i) a declaration that he was entitled to purchase and the respondent was obligated to sell the premises to him; (ii) specific performance of the tenancy agreement; (iii) damages in addition to or in lieu of specific performance; and (iv) an injunction restraining the respondent from evicting him from the premises. Whilst denying liability to the appellant's claims, the respondent counterclaimed for arrears of rental, vacant possession of the premises

and mesne profits. The trial judge dismissed the appellant's claim and allowed the respondent's counterclaim. Hence this appeal. It was the appellant's contention that the respondent was contractually bound to sell the premises to him at the purchase price of between RM7,000–RM8,000 and not at RM14,000 by virtue of the oral representation made by Tan Sri Basir. The appellant, however, failed to serve the subpoena on Tan Sri Basir. The issues raised before the court were: (i) whether Tan Sri Basir made the representation; (ii) if so, whether the burden shifted to the respondent when the appellant failed to serve the subpoena on Tan Sri Basir; (iii) whether an adverse inference under s 114(g) of the Evidence Act 1950 ('the Act') could be invoked against the respondent; and (iv) whether the counterclaim had been proved against the appellant.

Held, dismissing the appeal with costs:

- (1) (Per **Siti Norma Yaakob JCA**) The trial judge held that there was no evidence to show that Tan Sri Basir made any oral representation as to the purchase price of the premises. At the very most, the absent witness merely stated that he would discuss the matter with the other members of the board of the respondent. As this was a finding of fact, the court would not disturb the finding of the trial judge. In any event, a perusal of the notes of evidence confirmed that finding to have been correctly made (see p 634D).
- (2) (Per **Siti Norma Yaakob JCA**) According to s 103 of the Act, a person who alleges must prove such allegation. Thus, it was incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness did not shift the burden to the respondent to produce the witness and testify as to what he had uttered because: (i) the respondent had never raised such an allegation; and (ii) the respondent denied even making one (see p 635C–D).
- (3) (Per **Siti Norma Yaakob JCA**) For this very reason, the adverse inference under s 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent. There was no obligation in law for the respondent to produce the witness as that obligation rested with the appellant, the party who made the allegation, and the fact that the appellant was unable to do so was fatal to his case. For this very reason too, the adverse inference under s 114(g) was invoked against the appellant (see p 635E).
- (4) (Per **Siti Norma Yaakob JCA**) As for the counterclaim, there was the contemporaneous evidence in the second notice of eviction and the fact that the appellant had failed to deliver vacant possession of the premises to this day, and as such, his continued occupation of the premises without payment of any rent was that

A of a trespasser. Added to this was the clear and unequivocal admission by the appellant that he had not been paying the rental of the premises since July 1985. On this un rebutted evidence, there was no justification to disturb the finding of the trial judge that the counterclaim had been proved against the appellant (see p 635F–G).

B (5) (Per **Abdul Malek Ahmad JCA**) Since the appellant's claim rested solely on the oral representation by Tan Sri Basir who did not give evidence; since his own independent witness (PW2) did not support this allegation; and since he had rejected the offer to buy at the higher price, the appellant's claim must surely fail (see p 637E).

C (6) (Per **Mokhtar Sidin JCA**) On the evidence, it was clear that there was no offer by Tan Sri Basir to sell the premises at the lower price. The figure of RM7,000–RM8,000 was only an offer by the appellant to buy the premises which was never accepted by Tan Sri Basir purportedly to be representing the respondent. As such, the appellant failed to prove that a contract existed between him and the respondent for the sale of the premises at the price of RM7,000–RM8,000 (see p 640B–C).

E **[Bahasa Malaysia summary]**

F Penentang telah memajukan sebidang tanah yang terletak di Mukim Johor Bahru sebagai kawasan perumahan dan membina rumah-rumah kos rendah ('premis tersebut') dan menyewakannya. Perayu adalah salah seorang daripada penghuni premis tersebut. Terma-terma dan syarat-syarat penyewaan perayu dikawal oleh perjanjian penyewaan bertarikh 6 September 1977 yang termasuk opsyen untuk membeli premis tersebut pada penyempurnaan jangka masa penyewaan selama tiga tahun pada harga yang akan ditetapkan oleh penentang. Perayu melaksanakan opsyennya untuk membeli premis tersebut pada bulan Jun 1980 dan penentang membuat tawaran untuk menjual premis tersebut pada harga RM14,000. Bagaimanapun, perayu menolak tawaran itu atas alasan bahawa ia tidak mematuhi representasi lisan yang dibuat oleh wakil penentang, seorang Tan Sri Dato' Hj Basir ('Tan Sri Basir') yang hadir di perjumpaan pada bulan September 1978, bersama dengan pegawai-pegawai penentang yang lain dan seorang ahli dewan undangan negeri (PW2), yang diadakan untuk tujuan membincangkan opsyen tersebut di mana harganya disebut sebagai di antara RM7,000–RM8,000. Ekoran daripada itu, penentang menarik balik tawaran untuk menjual premis tersebut. Pada bulan Disember 1985, penentang memberi notis sebulan kepada perayu untuk mengosongkan premis tersebut. Notis keluar yang kedua diberikan pada bulan Julai 1986. Perayu masih belum menyerahkan milikan sehingga hari ini. Dalam prosiding yang difailkan terhadap penentang pada bulan Mac 1986, perayu menuntut, antara lain:

I (i) suatu deklarasi bahawa beliau berhak untuk membeli dan

penentang berkewajipan untuk menjual premis tersebut kepada beliau; (ii) pelaksanaan spesifik perjanjian penyewaan itu; (iii) ganti rugi sebagai tambahan atau sebagai ganti kepada pelaksanaan spesifik; dan (iv) suatu injunksi untuk menghalang penentang daripada mengusir beliau dari premis tersebut. Penentang menafikan liabiliti terhadap tuntutan-tuntutan perayu dan membuat tuntutan balas untuk tunggakan sewa, milikan kosong premis tersebut dan hasil perantaraan. Hakim perbicaraan menolak tuntutan perayu dan membenarkan tuntutan balas penentang. Oleh itu, perayu membuat rayuan. Perayu menegaskan bahawa penentang adalah terikat secara kontrak untuk menjual premis tersebut kepada beliau pada harga beli di antara RM7,000–RM8,000 dan bukan pada RM14,000 memandangkan kepada representasi lisan yang dibuat oleh Tan Sri Basir. Bagaimanapun, perayu gagal untuk menyampaikan sepina ke atas Tan Sri Basir. Isu-isu yang ditimbulkan di hadapan mahkamah adalah: (i) sama ada Tan Sri Basir membuat representasi tersebut; (ii) jika begitu, sama ada beban bukti beralih kepada penentang apabila perayu gagal untuk menyampaikan sepina ke atas Tan Sri Basir; (iii) sama ada inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 ('Akta tersebut') boleh digunakan terhadap penentang; dan (iv) sama ada tuntutan balas telah dibuktikan terhadap perayu.

Diputuskan, menolak rayuan dengan kos:

- (1) (Oleh **Siti Norma Yaakob HMR**) Hakim perbicaraan telah memutuskan bahawa tidak ada bukti untuk menunjukkan bahawa Tan Sri Basir membuat apa-apa representasi lisan berkenaan dengan harga beli premis tersebut. Jika ada pun, saksi yang tidak hadir itu hanya menyatakan bahawa beliau akan membincangkan perkara itu dengan ahli-ahli lembaga penentang. Oleh kerana ini adalah satu pendapat fakta, mahkamah tidak akan mengganggu pendapat hakim perbicaraan. Dalam apa keadaan pun, penelitian nota-nota keterangan mengesahkan bahawa pendapat itu adalah dibuat dengan betul (lihat ms 634D).
- (2) (Oleh **Siti Norma Yaakob HMR**) Mengikut s 103 Akta tersebut, seseorang yang membuat pengatahan hendaklah membuktikan pengatahan itu. Oleh itu, adalah menjadi kewajipan perayu untuk mengemukakan Tan Sri Basir sebagai saksi untuk membuktikan pengatahan itu. Fakta bahawa perayu tidak dapat memperolehi kehadiran Tan Sri Basir sebagai saksi tidak mengalihkan beban kepada penentang untuk mengemukakan saksi itu dan memberi keterangan berkenaan dengan apa yang telah dikatakan olehnya kerana: (i) penentang tidak pernah menimbulkan pengatahan itu; dan (ii) penentang menafikan pernah membuat pengatahan itu (lihat ms 635C–D).
- (3) (Oleh **Siti Norma Yaakob HMR**) Untuk sebab ini, inferens bertentangan di bawah s 114(g) Akta tersebut yang digunakan

- A oleh perayu tidak boleh diterima sebagai menetapkan bahawa sekiranya saksi itu dikemukakan, keterangannya akan beroperasi terhadap penentang. Tidak ada kewajiban dalam undang-undang bagi penentang untuk mengemukakan saksi itu kerana kewajiban itu terletak pada perayu, pihak yang membuat pengataan, dan
- B fakta bahawa perayu gagal untuk berbuat demikian adalah padah kepada kesnya. Untuk sebab ini juga, inferens bertentangan di bawah s 114(g) digunakan terhadap perayu (lihat ms 635E).
- C (4) (Oleh **Siti Norma Yaakob HMR**) Berkenaan dengan tuntutan balas, terdapat keterangan semasa dalam notis keluar kedua dan hakikat bahawa perayu telah gagal untuk menyerahkan milikan kosong premis tersebut hingga ke hari ini, dan oleh itu, penghuniannya yang berterusan di premis tersebut tanpa apa-apa bayaran sewa adalah suatu pencerobohan. Tambahan kepada ini adalah pengakuan yang jelas dan tanpa keraguan oleh perayu bahawa beliau telah tidak membayar sewa premis tersebut sejak bulan Julai 1985. Atas keterangan yang tidak dipatahkan ini, tidak ada justifikasi untuk mengganggu pendapat hakim perbicaraan bahawa tuntutan balas telah dibuktikan terhadap perayu (lihat ms 635F–G).
- D (5) (Oleh **Abdul Malek Ahmad HMR**) Oleh kerana tuntutan perayu hanya berdasarkan kepada representasi lisan oleh Tan Sri Basir yang tidak memberi keterangan; oleh kerana saksi bebas perayu (PW2) tidak menyokong pengataan ini; dan oleh kerana beliau telah menolak tawaran untuk membeli pada harga yang lebih tinggi, tuntutan perayu semestinya gagal (lihat ms 637E).
- E (6) (Oleh **Mokhtar Sidin HMR**) Berdasarkan keterangan, adalah jelas bahawa tidak ada tawaran oleh Tan Sri Basir untuk menjual premis tersebut pada harga yang lebih rendah. Harga RM7,000–RM8,000 hanyalah satu tawaran oleh perayu untuk membeli premis tersebut yang tidak pernah diterima oleh Tan Sri Basir yang dikatakan mewakili penentang. Oleh itu, perayu gagal untuk membuktikan bahawa suatu kontrak wujud di antara perayu dan penentang untuk jualan premis tersebut pada harga RM7,000–RM8,000 (lihat ms 640B–C).]
- F
- G

Notes

- H For cases on terms, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2196–2255.
- For cases on burden of proof, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 158–359.

I Legislation referred to

Evidence Act 1950 ss 101, 102, 103, 114(g)

Appeal from: Civil Suit No 22–264–86 (High Court, Johor Bahru)

Karpal Singh (Karpal Singh & Co) for the appellant.

Wan Mansor bin Wan Mahmood (Ahmad Jallaluddin bin Ariffin with him) (*Roslani & A/ Ariffin*) for the respondent.

19 June 1996

Siti Norma Yaakob JCA: The present proceedings stem from a civil suit initiated by the appellant against the respondent, and the trial of the suit is a test case for 116 other cases brought by various persons who share similar claims like the appellant against the same respondent.

The appellant is the occupier of premises built by the respondent on a piece of land known as Lot PTD 7244, in the Mukim of Johor Bahru, District of Johor Bahru, State of Johor, covering an area of about 79 acres. The land originally belonged to the State Government of Johor but has since been alienated to the respondent (the investment arm of the government) who developed it into a housing estate known as Tampoi Housing Estate and built 999 units of low cost houses and rented them out to displaced persons like the appellant.

The terms and conditions of the appellant's tenancy are governed by a tenancy agreement dated 6 September 1977, and for the purpose of this appeal, cll 1, 2(1), 4(3)(a) and (b) are most pertinent. They set out:

- (1) the period of the tenancy to be three years effective from 1 August 1977 to 31 July 1980;
- (2) the monthly rental to be RM55.50;
- (3) the option to be granted to the appellant to purchase the premises at the expiry of the tenancy at a price to be determined by the respondent and provided that the appellant had not committed any breach of his obligations under the agreement;
- (4) that such option may be exercised by the appellant giving written notice of his intention to purchase the premises not less than three months before the expiry of the tenancy; and
- (5) that in the event the option is exercised, the total rental paid and the deposit made shall be calculated and treated as part payment towards the purchase price.

The appellant exercised his option to purchase the premises by his letter dated 22 June 1980, and although it was made out of time, the respondent waived the breach by offering to sell the premises to the appellant for a sum of RM14,000. The offer and other conditions attached to the offer are contained in the respondent's letter dated 12 October 1981, which also gave the respondent 14 days from the receipt of the letter within which to accept the offer. The appellant did not accept the offer as he considered the purchase price to be unreasonable and excessive, particularly when the respondent had already represented to him at a meeting held three years earlier on 26 September 1978, that the premises would be sold to him at the price of between RM7,000–RM8,000. When attempts at negotiating for the price failed, the respondent by its letter dated 19 November 1981,

A withdrew its offer for non-acceptance. By letter dated 31 December 1985, the respondent gave notice to the appellant to vacate the premises by 31 January 1986. When the appellant failed to comply, a second notice dated 29 July 1986 was issued by the respondent's solicitors giving the appellant time until 31 August 1986 to quit and deliver vacant possession of the premises. He has to date not done so.

B In proceedings filed against the respondent in March 1986, the appellant claims, inter alia, for:

- C (1) a declaration that he is entitled to purchase and the respondent is obligated to sell the premises to him (interestingly, this prayer does not specify the purchase price, the very crux of the dispute between the parties);
- (2) specific performance of the tenancy agreement;
- (3) damages in addition to or in lieu of specific performance; and
- D (4) an injunction restraining the respondent from evicting him from the premises.

Whilst denying liability to the appellant's claims, the respondent has also counterclaimed principally for arrears of rental from August 1985 to January 1986, vacant possession of the premises and mesne profits at RM110 per month from February 1986 to date of vacant possession.

E In the court below, the trial judge, inter alia, dismissed the appellant's claim with costs, and in allowing the respondent's counterclaim, entered judgment against the appellant for RM721.50 being arrears of rental and mesne profits at RM110 per month calculated from 1 February 1986 till date of vacant possession and interest at 8% pa. It is to appeal against this decision that the parties are now before us.

F At the trial, the appellant called one other witness besides himself. He was, however, unable to serve the subpoena on his second witness despite various adjournments granted by the court below to enable him to do so. It was the unavailability of this witness that created a number of issues before us.

G That witness was to be Tan Sri Dato' Hj Basir bin Ismail ('Tan Sri Basir') who is alleged by the appellant to have represented to him and the other tenants that met him at a meeting held on 26 September 1978 that the premises would be offered to the appellant at the purchase price of between RM7,000–RM8,000. At that material time, Tan Sri Basir was a director of the respondent, and it is the appellant's contention that the oral representation made by Tan Sri Basir had the effect of varying cl 4(3)(a) of the tenancy agreement, and that the respondent is contractually bound to sell the premises to him at the purchase price of between RM7,000–RM8,000 and not at RM14,000 as was offered to him.

H The respondent has not disputed that a dialogue session was indeed held with the tenants on 26 September 1978 when Tan Sri Basir was

present, together with other officers of the respondent and a member of the state legislative assembly for that area — Tuan Hj Ali bin Othman, the appellant's witness, PW2.

Before us four issues were raised:

- (1) whether Tan Sri Basir made the representation;
- (2) if so, whether the burden shifts to the respondent when the appellant failed to serve the subpoena on Tan Sri Basir;
- (3) whether an adverse inference under s 114(g) of the Evidence Act 1950 ('the Act') can be invoked against the respondent; and
- (4) whether the counterclaim has been proved against the appellant.

As to the first issue, the trial judge held that there is no evidence to show that Tan Sri Basir made any oral representation as to the purchase price of the premises. At the very most, the absent witness merely stated that he would discuss the matter with the other members of the board of the respondent. As this is a finding of fact, we are loathe to disturb the finding of the trial judge. In any event, a perusal of the notes of evidence confirms that finding to have been correctly made.

In his examination-in-chief, the appellant testified as follows:

At this meeting, it was agreed that the State Economic Development Corporation would sell the house at a purchase price of between RM7,500–RM8,000. There was a firm agreement reached between the parties at the meeting.

Later, when he was cross-examined, his testimony sounded like this:

When we went to the meeting, our group had arrived at a price of RM7,000–RM8,000 in order to purchase the house. The tenancy agreement has mentioned that the price to purchase the house is between RM7,000–RM8,000.

When he was referred to cl 4(3)(a) of the agreement, he admitted that:

... the agreement does not mention the figures of RM7,000 –RM8,000. All this while I was under the impression that the State Economic Development Corporation intended to sell the houses between RM7,000–RM8,000. At the meeting on 26 September 1978, the figures of RM7,000–RM8,000 were put by our representative to Tan Sri Dato Hj Basir. On hearing our proposals, Tan Sri Dato Hj Basir stated that he would have to discuss the matter with the State Economic Development Corporation before an offer is made in writing.

PW2, who was also present at the dialogue session, confirmed this evidence when he was recalled by the appellant to testify as to what had transpired during the dialogue and his evidence appears as follows:

The purpose of the meeting was to know whether SEDC wanted to sell the houses to the residents. Tan Sri Basir told the residents that the houses would be sold to all of them including the plaintiff. I did not hear anything about the price which the houses were to be sold to the residents. I did not hear about a specific figure, but there was a discussion about the price.

- A From the appellant's oral testimony and that of his witness PW2, there is no evidence to conclude that Tan Sri Basir made any oral representation to the appellant that the premises would be sold to him at the price of between RM7,000–RM8,000. We therefore confirm the trial judge's finding on this. It also stands to reason that as a director of the respondent, it would not have been right and proper for Tan Sri Basir to make a commitment on the purchase price of the premises, but that the matter be brought before the full board of the respondent.

- B The allegation of the oral representation has been pleaded by the appellant at para 8 of his statement of claim, and denied by the respondent at para 5(a) of its amended statement of defence.

- C He who alleges must prove such allegation and the onus is on the appellant to do so. See s 103 of the Act. Thus, it is incumbent upon the appellant to produce Tan Sri Basir as his witness to prove the allegation. The fact that the appellant was unable to secure the attendance of Tan Sri Basir as a witness does not shift the burden to the respondent to produce the witness and testify as to what he had uttered, as firstly, the respondent never raised such an allegation and, secondly, has denied even making one. For this very reason, the adverse inference under s 114(g) of the Act relied upon by the appellant cannot be accepted as establishing that if the witness had been produced, his evidence would work against the respondent.
- D There is no obligation in law for the respondent to produce the witness as that obligation rests with the appellant, the party who alleges, and the fact that the appellant was unable to do so is fatal to his case. For this very reason too, the adverse inference under s 114(g) is invoked against the appellant.

- E As for the counterclaim, there is the contemporaneous evidence in the second notice of eviction dated 29 July 1986, and the fact that the appellant had failed to deliver vacant possession of the premises to this day and as such his continued occupation of the premises without payment of any rent is that of a trespasser. The respondent's senior manager, DW2 had testified to this. Added to this is the clear and unequivocal admission by the appellant that he has not been paying the rental of the premises since July 1985. On this unrebutted evidence, there is no justification to disturb the finding of the trial judge that the counterclaim has been proved against the appellant.

- F On the facts and circumstances of this case, we had dismissed the appeal with costs, affirmed the decision of the trial judge and ordered the deposit to be paid to the respondent to account of its taxed costs. Upon the application of the appellant, we had also ordered a stay of our judgment pending an application for leave to appeal to the Federal Court.

I 26 June 1996

Abdul Malek Ahmad JCA: We heard this appeal on 24 April 1996, and after dismissing it on the same day, had indicated to the parties that we would give our reasons for doing so as this decision affects 116 other similar cases. We now do so.

The appellant is apparently unhappy because he has not been able to buy over a low cost house in Tampoi Housing Estate, namely house No 38D, Lot No PTD 7244, Mukim of Johor Bahru ('the premises') which he had rented for RM55.50 per month since 1 August 1977, despite exercising his option to do so at the end of his three-year tenancy.

Under the relevant tenancy agreement, he was entitled to exercise this option provided that he had not committed any breach of his obligations under the agreement, and provided that the written notice of his intention to purchase was given not less than three months before the expiry of the tenancy or its renewal. The purchase price, however, was to be determined by the respondent, but the total rental and the deposit were to be treated as part payment of the purchase price.

Although the appellant exercised his option to purchase out of time, ie on 22 June 1980, the respondent offered to sell the premises to the appellant for RM14,000 by letter dated 12 October 1981. The appellant, however, rejected the offer on the basis that it was not in compliance with the promise made by the representative of the respondent who was present at the meeting on 26 September 1978, which was held for the purpose of discussing the option when the price was quoted as being between RM7,000 and RM8,000.

Consequently, on 19 November 1981, the respondent withdrew their offer of sale. On 31 December 1985, the respondent gave the appellant one month's notice to vacate the premises. A second notice to quit was given on 19 July 1986. The appellant has yet to give up possession to this day, and the respondent had counterclaimed for vacant possession, rental arrears and mesne profits. The appellant's claim in the court below is for a declaration that he is entitled to purchase and the respondent is obligated to sell the premises although the price had not been stated in the application, specific performance of the tenancy agreement, damages in addition to or in lieu of specific performance and an injunction restraining the respondent from evicting him from the premises. The learned trial judge had dismissed the claim with costs and had allowed the counterclaim with costs. Hence this appeal.

The main argument at the appeal stage was the failure of the appellant to call the representative of the respondent, Tan Sri Dato' Basir Ismail ('Tan Sri Basir') who was then a director of the respondent, and who was purportedly the person who had promised on behalf of the respondent to sell the premises at between RM7,000–RM8,000. Relying solely on that representation made by a representative of the respondent, the appellant contended that the respondent was bound by it and should not have subsequently offered to sell the premises at the higher figure of RM14,000.

Having perused the notes of evidence, the grounds of judgment of the learned trial judge and the submissions of learned counsel for both parties, we were inclined to agree with the finding by the learned trial judge that the relevant witness who was not called, namely Tan Sri Basir, had not made such a representation on the purchase price, but had only

- A promised to refer the matter to the respondent's board members before a firm offer could be made on the price.

Further to that, another witness of the appellant, who is the local state assemblyman, and who was also present at the said meeting — who we would regard as being quite independent — had testified that he did not hear any specific figure for the price being mentioned although there was a discussion on it.

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We also hold that it is the appellant, under the rules of evidence, who should call Tan Sri Basir to prove their point and not hope for the respondent to do so. The difficulty and failure to do so does not mean that their burden shifts to the respondent who are in fact denying the allegation.

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This can be seen from the number of adjournments allowed by court to enable the service of the subpoena on Tan Sri Basir to be effected by the appellant. It was the appellant, probably due to their difficulty to call Tan Sri Basir, who had recalled the local state assemblyman at a subsequent hearing to prove their point, but their plan obviously misfired. The appellant cannot now say that it is the respondent who should have called Tan Sri Basir and that s 114(g) of the Evidence Act 1950 would apply against the respondent in these circumstances. In fact, in our view, that very provision should apply against the appellant for failing to call Tan Sri Basir.

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- E Since the appellant's claim rests solely on this oral representation by Tan Sri Basir who did not give evidence; since his own independent witness, the local state assemblyman, did not support this allegation; and since he had rejected the offer to buy at the higher price, the appellant's claim must surely fail. As regards the counterclaim, the appellant has admitted that he has not been paying the rental since July 1985 despite still occupying the premises and so there is no reason for us to interfere with the learned trial judge's order in allowing the counterclaim for arrears of rental from July 1985 to the date of vacant possession with costs and for interest at 8% pa on the said sum.

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- G Accordingly, the appeal is hereby dismissed with costs and the deposit is to be paid to the respondent to account for their taxed costs. Pending the application for leave to the Federal Court, we had also granted a stay despite strong objections from learned counsel for the respondent.

4 July 1996

- H **Mokhtar Sidin JCA:** The appellant in this appeal was the plaintiff in the court below. The appellant had, on 3 March 1986, filed a claim against the respondent for a declaration that the appellant is entitled to purchase and the respondent is obligated to sell a piece of land comprising 1,200 sq ft described as No 38-D, Block 38, Lot PT(D) 7244 ('the said land'). The appellant also prayed for specific performance of an agreement or in the alternative, damages in addition or in lieu of specific performance.

- I

The agreement appears to be a tenancy agreement dated 6 September 1977 which includes an option to purchase the said land on completion of a period of tenancy of three years. The respondent did not

deny this, but averred that the purchase by the appellant was to be based on an offer by the respondent. It is common ground between the parties that there was an offer dated 12 October 1981 by the respondent to the appellant to sell the said land for the sum of RM14,000. There were negotiations with the final result the appellant refuses the offer. The ground for the refusal was that the price of RM14,000 was unreasonable and excessive and this was denied by the respondent.

It was contended by the appellant that the respondent through one Tan Sri Dato' Haji Basir ("Tan Sri Basir") had made an offer to sell the land to the appellant at the price of RM7,000–RM8,000. This was denied by the respondent and two reasons were given for doing so. Firstly, no such offer was ever made by Tan Sri Basir, and secondly, even if there is such an offer by him, he could not do so on his own without the authority of the board of the respondent.

In this respect, it is clear to us that sometime on 26 September 1978 the appellant attended a dialogue between the tenants of the flat and Tan Sri Basir. This dialogue took place on the initiative of Hj Ali bin Osman (PW2) who was the wakil rakyat. It was alleged by the appellant that Tan Sri Basir, as the chairman of the respondent, made the offer to sell at the price between RM7,000–RM8,000. The respondent denied that Tan Sri Basir was the chairman of the respondent, and stated that at that time, the chairman of the respondent was the Menteri Besar. It is clear from the evidence that the respondent is a statutory corporation established by the government of the State of Johor by virtue of Enakmen Perbadanan Kemajuan Ekonomi Negeri Johor (PKENJ) Bil 4 of 1968 ("the Enactment"). The Enactment came into force on 28 May 1968. At that material time, under the Enactment, the chairman of the respondent was the Menteri Besar of Johor. It appears to us that the thrust of the contention of the appellant is that since Tan Sri Basir was the chairman of the respondent, he has the authority to make the offer. In view of the fact that Tan Sri Basir was not the chairman, we are of the opinion that the contention advanced by the appellant failed. We believe that disposes the second issue.

The other issue before us was whether there was such an offer. It is clear that it was the appellant who asserted that Tan Sri Basir made the offer. Thus, the onus is on the appellant to satisfy the court that such an offer was ever made. This is clearly provided for by ss 101 and 103 of the Evidence Act 1950 ("the Act"). The sections read as follows:

101 Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that these facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

103 Burden of proof as to particular fact

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

- A It is clear from the above provisions on whom the onus lies. In the present case, it is the appellant who had asserted the existence of a particular fact, viz that there was an offer to sell the said land at the price between RM7,000–RM8,000. The onus is on the appellant to satisfy the court that there was such an offer. From the notes of evidence, it appears that the appellant gave evidence himself, and he called another witness (PW2) to support his evidence. From the notes of evidence, it is clear that the evidence of the appellant in respect of the price was not supported by PW2. PW2 gave evidence that there was a dialogue between Tan Sri Basir, several officers of the respondent and the tenants of the flat including the appellant, which took place on 26 September 1978. There were discussions of the sale of the units to the various tenants, but PW2 categorically stated that no price was ever mentioned. The offer to sell was not denied by the respondent and the respondent went on to make the offer to sell in writing of the various units to the tenants at the price of RM14,000. As far as we could see on the evidence, there was an offer for sale at the price of RM14,000 to the appellant. In the absence of any other evidence, we could not infer otherwise, viz that the price was other than RM14,000 as suggested by the counsel for the appellant. The onus is on the appellant to satisfy us that there was another offer different from the offer in writing which as contended by the appellant the price was between RM7,000–RM8,000. We believe the appellant could do so under s 92 of the Act. The onus is on the appellant to show that another price had been agreed upon.

It should be noted that the only issue is the price and not the sale. The only other person who could support the evidence of the appellant is Tan Sri Basir. The appellant was given every opportunity to call him to give evidence. From the notes, hearing was adjourned several times to enable the appellant to subpoena Tan Sri Basir. At the end of the day, the appellant elected not to call Tan Sri Basir. The end result is that the evidence of the appellant of the price was contradicted by his own witness (PW2). The appellant's evidence that the offer price was RM7,000–RM8,000 is a bare statement of the appellant without any proof.

- G The law in respect on whom the onus of burden of proof is in s 102 of the Act which states:

102 On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person which would fail if no evidence at all were given on either side.

- H Thus, when the appellant failed to produce Tan Sri Basir to give evidence in support, the appellant has failed to discharge the burden on him to satisfy the court that there was already an agreement to sell the said land at the price of RM7,000–RM8,000.

- I In the present case, there exists certain facts in favour of the respondent. In his judgment, the learned trial judge stated as follows:

The plaintiff did at some stage in his evidence under cross-examination state that at the meeting on 26 September 1978, the proposed figures of RM7,000–RM8,000 as purchase price of the premises, were put to Tan Sri Dato' Hj Basir and the said Tan Sri Dato' Hj Basir had said that he would

discuss the matter with the State Economic Development Corporation, before any offer is made in writing to the plaintiff.

From this, it is clear to us that there was no offer by Tan Sri Basir to sell at the price as stated by the appellant. Our reading of the above caption is that the figure of RM7,000–RM8,000 was only an offer by the appellant to buy the said property which was never accepted by Tan Sri Basir purportedly to be representing the respondent. The only evidence is that Tan Sri Basir said he would discuss the offer with the respondent. This offer was never accepted by the respondent because the letter of offer by the respondent clearly states that the price was RM14,000.

As such, we are of the opinion that the appellant failed to prove that there exists a contract between him and the respondent for the sale of the said land at the price of RM7,000–RM8,000. That in our view is sufficient to dispose of the appeal.

In view of the submission of the learned counsel for the appellant that the learned trial judge had wrongly applied s 114(g) of the Act, we have gone through the learned judge's judgment, and we are in entire agreement with the learned judge when he said that:

There is no justification whatsoever for drawing such an adverse inference under s 114(g) of the Evidence Act 1950.

Counsel for the appellant had invited the learned trial judge to draw the adverse inference against the respondent for not calling Tan Sri Basir as their witness. It is to be noted from the pleadings and the notes of evidence that it was the appellant who had asserted that Tan Sri Basir was the one who had made the offer. This was denied by the respondent throughout. As such, it is not in the interest of the respondent to call him. It is the respondent's case throughout that there was no offer by Tan Sri Basir and this has been supported by the evidence. In view of that we are of the opinion that the learned judge had applied the law correctly.

For the above reasons, we have no reason to disturb his decision. The appeal is hereby dismissed with costs. The order of the learned judge is affirmed. Deposit to be paid to the respondent towards costs to be taxed.

Appeal dismissed.

Reported by Jafisah Jaafar

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